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IN THE MATTER OF AN ARBITRATION

BETWEEN: **World Kitchen Canada (EHI) Inc.**
(The Employer)

- and -

United Steelworkers of America, Local 9045
(The Union)
Grievance of David Barnas

BEFORE: R. Jack Roberts, Arbitrator

FOR THE UNION: Brian Bressette
Representative

FOR THE EMPLOYER: Martin J. Addario
Counsel

HEARINGS: St. Catharines, Ontario
June 22; September 10, 2007

AWARD

I. Introduction:

After a lengthy undercover investigation of allegations of widespread drug and alcohol use on the employer's property, the employer terminated a number of employees including the grievor. At arbitration, the union claimed on behalf of the grievor that the termination either should be set aside due to unreasonable delay by the employer in imposing discipline, or lesser discipline should be substituted for the termination. For reasons which follow, the termination is upheld and the grievance is dismissed.

II. Factual Background:

The grievor, who had 5.5 years of seniority, was employed as a shipper/receiver at the employer's warehouse in Niagara Falls, Ontario. The warehouse was a 100,000 square foot facility that housed pallets containing boxes of kitchen-ware products. The pallets were stacked in pre-designated slots on racks that extended upward for a considerable distance. The employer ran two shifts in the warehouse, days and afternoons. A total of about sixty-one bargaining unit employees were employed to work the shifts. Two-thirds of them were shipper-receivers like the grievor. They operated a fleet of about 24 forklift trucks. Several of the forklifts were of the high-reach type, which were needed to access the slots in the upper regions of the racks.

As a shipper/receiver, the grievor spent some of his time using a forklift to load and unload trucks. The majority of his time, however, was spent picking boxes of product from the racks to fill orders from the employer's customers. It was undisputed that this involved him and

the other shipper/receivers in driving high-reach forklifts carrying heavy loads from aisle to aisle, with frequent interruptions to manoeuvre into and out of tight spaces. As a result, safe operation of the forklifts was a major concern to both the employer and employees. The plant rules that were posted by the employer made it clear that "willful or inexcusable" violations of "safety rules" and "speeding and careless driving of fork trucks" would be "dealt with firmly under a uniform policy."

The shipper/receivers were not closely supervised. According to the evidence, there were very few management employees on each shift. Generally, bargaining unit employees who were appointed to lead hand positions were relied upon to oversee the activities of the shipper/ receivers. They reported to Mr. Don Woolnough, the Warehouse Manager. Until November 21, 2006, when he voluntarily stepped down from the position, the grievor was a rotating lead hand. Mr. Woolnough explained that this meant that when the grievor was on the afternoon shift he performed the duties of a lead hand. On the day shift, he reverted to his shipper/receiver position unless he was needed to fill in for any lead hands who were off work due to illness, vacation, etc.

In early 2006, during an investigation of a particularly difficult termination case, several employees alleged that there was widespread drug and alcohol use going on in the warehouse. If true, the allegations warned of the existence a most serious problem -- an on-going and willful violation by a number of warehouse employees of a safety-related plant rule forbidding "[c]onsuming or possessing alcoholic beverages or illegal drugs or substances on Company Property." The employer's Human Resources Manager, Ms. Aileen Turnbull, and the employer's

Vice President, Operations, Mr. Sam Linwood, called a meeting in which they discussed the allegations in confidence with the then Local Union President, Mr. Jos. Cote, and a union steward, Mr. Chris Cage. They asked for suggestions from the union about how to deal with the problem. No real response, however, materialized.

Ms. Turnbull then decided to research possible ways in which to identify and root out the problem. Her research led her to a private investigation firm called AFI. The idea was to hire on as a shipper/receiver an investigator from AFI, who would then be in a position to report on any drug or alcohol use that he observed in the course of his shift. His first assignment would be to the grievor's shift, which apparently was the one on which, according to the allegations, most of the drug and alcohol use had been observed. Ms. Turnbull presented her proposal to Mr. Frank Nineshein, the employer's Vice President in Chicago, and when he ultimately gave his approval she put the plan into action.

By this time, it was the summer of 2006, and it was not until August that the AFI investigator was on the scene as a shipper/receiver assigned to the grievor's shift. According to the investigator's reports, the grievor was the first employee that he observed using illegal drugs on the employer's property. His notes indicated that at 9:00 p.m. on Friday, August 11, he saw the grievor smoking a pipe containing drugs in the car of another employee. He made a similar sighting of the grievor at 9:00 p.m. on Tuesday, August 22. At 6:15 p.m. on the next day, August 23, he saw the grievor retrieve a can of beer from his car and drink it in the car of another employee.

There were three more sightings of the grievor in September. At 3:40 p.m.on Tuesday, September 5, just before his afternoon shift was to begin, the grievor was observed drinking a can of beer in his car on the employer's property. Three days later, at 6:14 p.m. during a break on Friday, September 8, the grievor was observed drinking another beer in a car. Then, at 7:05 a.m. on the following Monday, September 11, the grievor was observed smoking a pipe containing drugs in his own car.

Two more sightings of the grievor followed in October and November. At 9:45 a.m., during a break on Tuesday, October 10, the grievor was observed smoking a pipe containing drugs in his car. Again, at 6:55 a.m. on Thursday, November 9, just before the start of their shift, the grievor and another employee were observed in the grievor's car smoking a pipe containing drugs that they passed to each other. Shortly after that, on November 11, the investigator was forced to take a leave of absence due to an illness in his family. He did not return until December 4.

Twelve days after the last sighting, on Tuesday, November 21, the grievor met with Mr. Woolnough, the Warehouse Manager, and told him that he wished to step down from his lead hand position. He said that the pressures of the lead hand job, combined with his personal problems, were becoming too much for him to handle. As to the problems in his personal life, the grievor explained that his wife was leaving him and he was struggling with a substance abuse problem. According to Mr. Woolnough, when he asked the grievor if there was anything he or the company could do to help, the grievor replied no, that he was handling it on his own. At

no time did the grievor indicate to Mr. Woolnough that his substance abuse problem had led him to consume drugs and alcoholic beverages on company property.

The grievor testified that he refused help from Mr. Woolnough and the employer because he'd already set up counselling with a family therapist in Niagara Falls, Mr. Bob Gilmour. He agreed that Mr. Gilmour was not a substance abuse counsellor and that his primary purpose in seeing him was to seek a resolution to his marital problems. In the course of the family therapy, he said, his substance abuse problem nevertheless was discussed.

When the investigator returned on December 4, 2006, he was assigned to the shift opposite that of the grievor. Ms. Turnbull explained that this change in assignment was made because the employer wanted to cast a wider net and determine whether there were similar drug and alcohol use problems on that shift. The investigator remained as a shipper/receiver on this shift until January 11, 2007, when, as a junior person, he was required to be laid off from his shipper/receiver position in a broader layoff instituted by the employer. By that time, Ms. Turnbull testified, the employer had all of the information that it needed to form a basis for confronting and taking action against each of the employees who had been observed using drugs and/or alcohol on company property. In all, she said, there were seven such employees including the grievor.

It was decided to conduct individual interviews with each of the seven employees and their union representation, if possible, on January 19, 2007. In attendance on behalf of the

employer were Mr. Linwood, the Vice President, Operations; Ms. Turnbull; and, the investigator. On the union side, there was the employee in question and Ms. Judy McDougall, the then Unit Chairperson for the local union. In the course of each meeting, the employee was confronted with the investigator's record of his drug and/or alcohol use on company property and asked for his side of the story. The grievor was one of five employees who met with the representatives of the employer that day. The remaining two were interviewed later.

When the grievor's turn came, he was asked if he was aware of the plant rule forbidding the consumption or possession of illegal drugs on company property. He replied that he was. He then was confronted with the investigator's record of his drug and alcohol use on company property, and he readily admitted that he had engaged in such activities on several occasions, including those recorded by the investigator. He did not claim that he could not recall the specific instances of drug and alcohol use recorded by the investigator because they were too distant in the past. Instead, he claimed that he used drugs and alcohol at work because he suffered from an addiction to these substances, and should be off work in a treatment program. He said that he told Mr. Woolnough about his substance abuse problem in November, 2006, and was currently receiving counselling on his own. At the moment, he added, he was clean and sober but he had spent the last twenty years of his life in a haze because he'd had a problem with drugs and alcohol since he was a teen.

When Ms. Turnbull asked the grievor for more details about the substance abuse program in which he said that he was receiving counselling, the grievor gave little elaboration. He said

that he had looked into a program and reiterated that he was seeing a counsellor. According to Ms. Turnbull, she then asked him whether he was aware of the employer's EAP program, which provided employees with free confidential counselling for, *inter alia*, drinking or drug use. She said that the grievor replied that he was, but that he had not contacted the EAP provider because he was not aware that he could use the program. Ms. Turnbull's contemporaneous notes of the interview indicated that when the grievor said this, Ms. McDougall, the then Unit Chairperson, responded that the EAP program was available to all employees.

The grievor, however, testified that he was totally unaware of the existence of the EAP program and that he did not recall Ms. Turnbull's bringing it to his attention in the course of the interview. He also did not recall Ms. McDougall's alleged comment in the interview that the EAP program was available to all employees. Similarly, the grievor said, he did not recall receiving any pamphlet from the employer describing the EAP program and urging employees with personal problems and concerns to call to schedule appointments.

I find that I must prefer the evidence of Ms. Turnbull on the question whether the EAP program was brought to the grievor's attention during the interview. Her testimony was given in a straightforward manner and was supported by contemporaneous notes that she made in the course of the interview. The grievor's testimony, on the other hand, was based upon an alleged inability to recall. Moreover, Ms. McDougall was in attendance at the hearing and was available to refute Ms. Turnbull's evidence regarding her alleged comment during the interview about the availability of the EAP program to all employees, but she was not called to do so. This raises an

inference that if she had been called, her testimony would not have supported the evidence of the grievor.

Likewise, I must reject the grievor's testimony that prior to the interview, he was unaware of the existence of the EAP program. Ms. Turnbull testified that when the program was brought into the warehouse in early Fall, 2006, a poster announcing the program was put up on the bulletin board in the warehouse. A sample of the poster was entered into evidence. In addition, she said, pamphlets detailing the confidential counselling services offered to employees for free in the EAP program were posted on the bulletin board and attached to every employee's pay stub. One of these pamphlets was entered into evidence. It was printed in colour on glossy paper in a striking and eye-catching style. Mr. Woolnough confirmed in his testimony that in late July or early August, 2006, he saw the pamphlets on the warehouse bulletin board and handed out pay cheques to the day shift employees that had the pamphlets attached to their stubs. In view of this evidence of widespread dissemination of news of the availability of the EAP program just five months before the interview, it seems highly improbable that the grievor was unaware of its existence.

In any event, at the conclusion of the interview Mr. Linwood informed the grievor that he was suspended without pay pending a final decision by management. The grievor responded that he hoped that the employer would take everything into consideration. Ms. Turnbull assured him that management would consider all of the facts.

Soon after the interview, Ms. Turnbull telephoned the grievor and asked him for a doctor's note to substantiate his claim that he was suffering from an addiction to illegal drugs and alcohol. In response, the grievor brought her a letter from his family therapist, Mr. Bob Gilmour. The letter did not say anything about the grievor having an addiction to illegal drugs and alcohol.

When Ms. Turnbull rejected the letter as insufficient to support the grievor's alleged addiction, the grievor returned with a second letter from Mr. Gilmour. This letter stated, in pertinent part:

> On December 11, 2006, . . . [the grievor] attended an assessment interview with myself in which . . . [he] shared with me information regarding former use of marijuana. This resulted in my providing . . . [him] with the phone number of NADAS, a local substance abuse counselling agency as well as a referral for . . . [him] to see a consulting psychiatrist. [He] . . . attended the psychiatric appointment on January 9, 2007. . . .

No report from the consulting psychiatrist confirming the existence of an addiction was provided by the grievor and there was no indication that the grievor ever contacted NADAS to arrange for substance abuse counselling. As a result, Ms. Turnbull once again rejected as unsupported the grievor's claim that he suffered from an addiction to drugs and alcohol. She told him that he had to provide credible information showing that he had an addiction problem and that he was getting help within the next day or two, before the employer made a final decision in his case.

The grievor called Ms. Turnbull back and offered to sign a release with his family counsellor, Mr. Gilmour, permitting him to provide more information directly to the employer.

Ms. Turnbull declined the offer. She said in her testimony that she did so because Mr. Gilmour was neither a medical doctor nor a substance abuse counsellor. What she needed, she told the grievor, was information from him that he had sought treatment for his addiction. At that point, the grievor said he had "done his own thing in kicking the habit." Ms. Turnbull responded with words to the effect that it was unlikely that he could conquer an addiction on his own. She needed information to support his claim that he was addicted.

No further information was provided by the grievor within the time limit specified by Ms. Turnbull. As a result, on January 24, 2007, it was decided to terminate the grievor for cause. A termination letter signed by Mr. Linwood, the Vice President, Operations, was prepared and sent to him.

The grievor received the letter of termination on January 25, 2007. He telephoned Ms. Turnbull and asked her why the employer put him to all the trouble of getting information if they were going to fire him anyway. Ms. Turnbull replied that the outcome was not predetermined, but that the employer needed supporting information to help it make its decision. She advised the grievor that their next discussion likely would be at a grievance meeting. Thereafter, on January 29, 2007, the grievor filed the grievance leading to the present proceeding.

III. The Issues Raised by the Parties:

At the conclusion of the evidence, the parties raised, *inter alia*, the following issues:

> (1) Whether the termination of the grievor ought to be set aside due to the delay of several months between the dates of the incidents involving the grievor and the date on which the employer confronted the grievor with them; and,
>
> (2) In the event that I decide to reach the merits, whether in the circumstances I should exercise my discretion to substitute a lesser disciplinary penalty for the termination of the grievor.

I will address these issues hereinbelow:

IV. Consideration of the Issues:

(1) The Delay Issue:

It seems to be well established in arbitral jurisprudence that three considerations must be weighed in deciding whether an employer's delay in imposing discipline was so unreasonable that the discipline must, as a matter of fairness, be set aside. They are as follows:

> (1) The prejudice to the grievor that resulted from the employer's delay;
>
> (2) The reasonableness of the employer's grounds for delay: and,
>
> (3) The longstanding notion in arbitral jurisprudence that discipline must be meted out in a reasonably expeditious fashion.

By far the most important of these considerations is the first, because "[t]he purpose of the arbitral rule against unreasonable delay is to ensure that employees are not prejudiced by an employer's procrastination in exercising its disciplinary powers." Brown & Beatty, *Canadian Labour Arbitration*, at 7:2120.

More often than not, the delay issue arises where, as here, the employer undertook an undercover investigation to root out a suspected serious problem and did not wish to "blow the cover" of its investigator until all of the results were in. The representative of the union, Mr. Bressette, directed my attention to three such cases, involving three different grievors who were terminated after the completion of several months of undercover surveillance at AFG Industries. These were *Re AFG Industries and Aluminum, Brick and Glass Workers International Union (Peake Grievance)*, [1998] O.L.A.A. No 577 (Weatherill); *Re AFG Industries and Aluminum, Brick and Glass Workers Union (Daze Grievance)* (1998), 53 C.L.A.S. 330 (H. D. Brown); and, *Re AFG and Aluminum, Brick and Glass Workers International Union (Walton Grievance)* (1998), 75 L.A.C. (4th) 336 (Herlich).

The first of the above cases to be decided was that of Arbitrator Weatherill, *AFG Industries (Peake Grievance), supra.* In that case, the grievor was disciplined in December for a single incident that one of the investigators reported in May. This was a delay of about eight months. Considering, *inter alia*, "the difficulty which the grievor (who of course had made no notes of any 'incident') would have in recalling the events of the day," *id.*, at para. 11, the learned arbitrator concluded that the employer "did not take disciplinary action against the grievor within a reasonable time." *Id.*, at para. 14. At the same time, he found that the employer's surveillance operation "was a reasonable response to a serious situation." *Id.*, at para. 15. But because the delay, though reasonable, necessarily affected the right of subsequently-disciplined employees to a fair hearing, and actually prejudiced the grievor's right in this respect, it "made it impossible for the company to take disciplinary action [against him]." *Id.* He added, "The decision not to act

promptly on this case was part of the price to be paid for the continuing surveillance: in this case, it would appear to me to have been a reasonable price." *Id.*

The arbitrators in the other two *AFG Industries* cases, *supra*, applied the above reasoning of Arbitrator Weatherill in deciding the matters before them, and their decisions do not need to be extensively reviewed. It suffices to say that in the *Daze Grievance, supra*, Arbitrator Brown essentially concluded that because the grievor "had no recollection of the incidents," *id.*, at para. 35, the employer's delays of eight and two months in imposing discipline were so prejudicial to his right to a fair hearing that they amounted to "procedural unfairness in the imposition of discipline against him." *Id.*, at para. 18. In the *Walton Grievance, supra*, Arbitrator Herlich was called upon to deal with a preliminary motion from the union to set aside the discipline of the grievor. The motion was made before the union introduced any evidence of actual prejudice to the grievor arising out of the employer's delay. The arbitrator nevertheless inferred from the employer's delay of four months in imposing discipline that actual prejudice existed. He said, "I have no hesitation in concluding that to ask the grievor, over four months after the fact, to recall the two specific transactions out of the many in the interim . . . is simply unfair and prejudicial." *Id.*, at 345.

In my opinion, the Herlich award in the *Walton Grievance, supra*, represents a high-water mark in these types of cases. I am not at all certain that I would reach the same conclusion in similar circumstances. It seems to me that inferring the existence of actual prejudice from a delay of four months would amount to painting with too broad a brush. That might be true in

some cases, but not in others. The better approach, I think, would have been to delay consideration of the union's motion until the union had an opportunity to introduce evidence of actual prejudice to the grievor.

The present case, I believe, is a good example of a delay in discipline of more than four months that, on the evidence, did not cause any actual prejudice to the grievor. Here, the eight incidents of drug or alcohol use for which the grievor was terminated took place over a period of from five to two months before the imposition of discipline. At least three of the incidents took place at the five-month level. Three others took place at the four-month level. As the incidents were read out to the grievor in his interview, he admitted to every one. He did not claim that he could not recall them. In fact, he indicated that in the course of his employment he had been involved in many more incidents of alcohol and drug use than those listed on the investigator's report. His defence was that he engaged in alcohol and drug use on the employer's property because he suffered from the illnesses of alcohol and drug addiction and should be in a treatment program.

Turning to the reasonableness of the employer's grounds for the delay, as in the *AFG Industries* cases, *supra*, I find that the employer's surveillance program was a reasonable response to a serious safety-related situation. The information that the employer had was that there was a serious drug and alcohol use problem in the warehouse. This indicated that there were several employees who were making a practice of using drugs and alcohol on the employer's property. As Ms. Turnbull testified, this was intolerable because the warehouse was

an inherently dangerous place with tall racks loaded with heavy goods and some twenty-four forklifts in action either picking or racking cartons of kitchenware. Given this, it was entirely reasonable for the employer to institute an undercover surveillance program to identify over time those employees on both shifts who were engaged in this perilous practice.

The only consideration that weighs against the employer is the third -- the longstanding arbitral notion that discipline must be meted out in a reasonably expeditions fashion. *Prima facie*, a delay in imposing discipline of five months or even two months does not satisfy this criterion.

When weighed against the first two considerations, however, this deficiency falls far short of swinging the balance toward setting aside the discipline of the grievor. As I observed at the outset of my discussion of this issue, it is well established that the purpose of the arbitral rule against unreasonable delay is to ensure that an employee is not prejudiced by an employer's delay in exercising its disciplinary powers. On the evidence, the grievor did not suffer any prejudice due to the delay in discipline here. Moreover, the delay was not arbitrary. It was reasonably necessary to permit the employer to make an appropriate response to a serious situation. These two considerations decisively swing the balance toward the position of the employer, and the issue is determined in its favour. I decline to set aside the discipline of the grievor.

(2) The Question of Substituting a Lesser Penalty for the Termination:

Early on in the hearing, the representative of the union, Mr. Bressette, advised me that the union would not be making any submission that the grievor was suffering from the illnesses of

drug and alcohol addiction and, as a result, no human rights issues would be raised. This was a somewhat surprising development, given the position that the grievor took in his interview and his subsequent dealings with Ms. Turnbull. In the interview, the grievor claimed that his drug and alcohol use on the employer's property was due to a longstanding drug and alcohol addiction and he should be in a treatment program. Ms. Turnbull's subsequent contacts with the grievor were all directed toward obtaining evidence from the grievor to confirm this claim. It was only when no convincing evidence of addiction appeared to be forthcoming that the employer terminated the grievor.

Given the decision of the union not to pursue the claim of addiction, the question whether to substitute a lesser penalty for the termination of the grievor fell to be decided on the usual criteria, such as the seriousness of the misconduct, the grievor's past employment record, his seniority, and his rehabilitative potential. Both counsel for the employer, Mr. Addario, and Mr. Bressette were in agreement that the grievor's practice of using drugs and alcohol at the workplace was very serious misconduct that called for the imposition of harsh discipline.

Mr. Addario went even further and submitted that the grievor's misconduct was so serious that, as a matter of deterrence to the remainder of the workforce, engaging in it should be deemed to be just cause *per se* for termination. In support of this submission, he cited three cases, *Re Johnson Controls and CAW-Canada, Local 222* (January 24, 2007), Unpublished Award (Levinson); *Re Fording Coal Ltd. and United Steelworkers of America, Local 7884* (2001), 97 L.A.C. (4th) 289 (B.C., Devine); and, *Re Steel Company of Canada Ltd. and United*

Steelworkers (1976), 14 L.A.C. (2d) 405 (Rayner).

Mr. Bressette strenuously opposed this submission, arguing that it would be patently unreasonable for an arbitrator to rely upon an alleged need for deterrence as a ground for deeming the commission of a particular offence to be just cause *per se* for termination. He pointed out that while the grievor's misconduct was very serious there were several mitigating factors that had to be taken into account. The grievor did not have a prior disciplinary record. He was regarded as a good employee and was appointed by management to the position of lead hand just two and one-half years after commencing his employment. While he had only 5.5 years of seniority, this placed him at about the halfway point on the seniority list of the employer. As to rehabilitative potential, the grievor readily acknowledged in his testimony and in his dealings with the employer that his misconduct was a very serious safety violation and indicated his willingness to change. This, it was submitted, provided a positive outlook for re-establishment of his employment relationship.

On the matter of deterrence, I do not intend to review at length the cases cited to me by Mr. Addario. It suffices to say that the need for deterrence is a consideration that arbitrators have taken into account in deciding whether to substitute lesser discipline, but the need has not of late become a ground for deeming certain types of misconduct such as serious safety violations to be just cause *per se* for termination. The only authority that came close to this extreme was the Rayner award in *Steel Company of Canada, supra*, but that award is over thirty years old and is of doubtful application in the current labour relations climate. In *Johnson Controls, supra,*

Arbitrator Levinson only considered deterrence to be a "factor of significance militating against reinstatement." *Id.*, at 5. He then went on to assess the other factors usually considered on the question. A similar approach was taken in *Fording Coal, supra.* In my opinion, the degree of significance given to the need for deterrence might well depend upon whether the significant safety violation was intentional. The arbitrator also must bear in mind that as a matter of fundamental fairness a grievor cannot unreasonably be pilloried just to serve as an example to rest of the employees.

Turning to the present case, I must say that I am not persuaded that there is a positive outlook for the re-establishment of the grievor's employment relationship. I find that I cannot give significant weight to his assurances that he will change his ways in the future. As I indicated in relating the factual background to the matter, the grievor exhibited some credibility problems in the course of his dealings with the employer and in his testimony. More significant on this issue, however, was the mysterious appearance of a suspicious doctor's note just before the hearing. I am persuaded that the doctor's note was actually written by or on behalf of the grievor in a last-minute attempt to provide the evidence of addiction that the employer said it needed. The circumstances were as follows:

The hearing in the matter was scheduled to commence on Friday, June 22, 2007. On Tuesday, June 19, 2007, the representative for the union, Mr. Bressette, sent an e-mail to counsel for the employer, Mr. Addario, which noted that among the documents to be relied upon at the hearing was a disputed doctor's note from the grievor's family physician, Dr. Philip McGarry,

that Mr. Bressette did not yet have in his possession. He undertook to provide a copy to Mr. Addario as soon as he received it.

At the hearing, a letter was entered into evidence that purported to have been written by Dr. McGarry on his office's letterhead on February 1, 2007. A stipulation was made between the parties that the grievor claimed that he gave the letter to Ms. Turnbull on the same date, February 1, 2007. The body of the letter read, word for word, as follows:

> Mr. Barnas has attending myself and is getting councilling for his cannabis addiction and is doing well.

The above sentence was not in literate form and misspelled the word "counselling" in so obvious a manner that it would be difficult to believe that it came from a medical doctor who was engaged in counselling as part of his practice.

Ms. Turnbull denied that she ever received such a letter from the grievor on February 1, 2007, or any other date. She added that when the letter materialized she checked the grievor's file to see whether her recollection was faulty, but the file contained no such letter. Ms. Turnbull also pointed out that a curious date stamp on the letter, stating "RECEIVED Mar 13 2007" was not a company date stamp.

Dr. McGarry was not called as a witness to authenticate the letter, nor was he called to give any details of the "counselling" that he was allegedly providing to the grievor for his so-called addiction. Indeed, it seems unlikely that he ever could have done the latter. The grievor

ultimately testified that he did not go to any rehabilitation program and was not seeing any counsellors.

Finally, and as previously noted, the union indicated at the hearing that it would not be making any submissions that the grievor was suffering from the illnesses of drug and alcohol addiction and, as such, would not be claiming that the grievor was entitled pursuant to human rights considerations to reasonable accommodation.

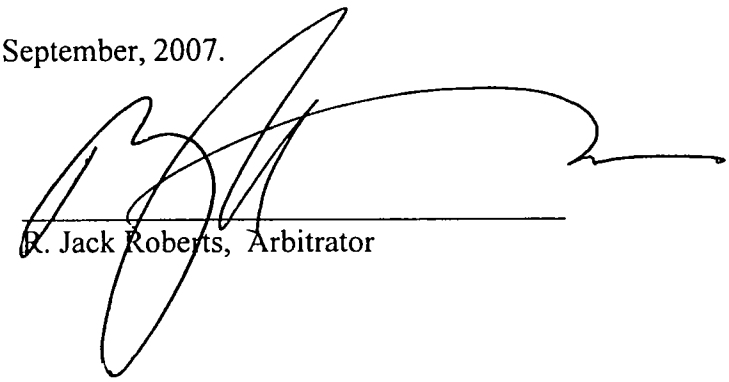
All of these factors raise a strong inference that the alleged letter from Dr. McGarry was, in all likelihood, written by or on behalf of the grievor. He might have provided it to the union in the hope that it would serve as the long-sought but ever-elusive evidence of addiction that the employer was requesting. I also find that he never gave such a letter to Ms. Turnbull, as he claimed, on February 1, 2007. At that time, as the above factors demonstrate, it did not even exist. In my opinion, the union wisely deduced as much and declined to place any reliance upon the letter in its case.

In the light of all of the above evidence of deception on the part of the grievor, I am far from persuaded of the trustworthiness of the grievor's assurances that he would change his ways if his employment relationship were to be re-established. His actions seem to speak louder than words, and they tend to point unmistakably to a lack of rehabilitative potential. The termination of the grievor is upheld and the grievance is dismissed.

V. Conclusion:

The grievance is dismissed.

Dated at Toronto, Ontario, this 18th day of September, 2007.



R. Jack Roberts, Arbitrator

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